

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Kenneth H. Tarbet

Serial No.: 09/888,031

Filed: June 25, 2001

For: GENERATION AND PROVISION OF
DIRECTED SALES INCENTIVES AT
LOCATIONS REMOTE FROM THE POINT OF
SALE

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Group Art Unit: 2162

Examiner: Alam, Shahid Al

Confirmation: 7507

Mail Stop: Appeal Brief – Patents
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APPEAL BRIEF

Dear Sirs:

This Appeal Brief is filed in support for the appeal in the above referenced application and is filed pursuant to the Notice of Appeal filed December 17, 2008. Appellant authorizes all required fees under 37 C.F.R. § 1.17 to be charged to Deposit Account No. 50-1515, of Conley Rose, P.C. of Texas.

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I. REAL PARTY IN INTEREST

The real party in interest in the instant application is the following party: Safeway, Inc.

II. RELATED APPEALS AND INTERFERENCES

None.

III. STATUS OF CLAIMS

A. Total Number of Claims in the Application.

The number of claims in the application is: 1 – 32.

B. Status of All Claims in the Application.

1. Claims canceled: 1-6, 8, and 11-15.
2. Claims withdrawn from consideration but not canceled: 26 – 32.
3. Claims pending: 7, 9, 10, and 16-25.
4. Claims allowed: None.
5. Claims rejected: 7, 9, 10, and 16-25.
6. Claims neither rejected nor allowed: None.

C. Claims on Appeal.

The claims on appeal are: 7, 9, 10, and 16-25.

IV. STATUS OF AMENDMENTS

No amendments were filed subsequent to the Final Office Action of October 17, 2008.

V. SUMMARY OF CLAIMED SUBJECT MATTER

This section provides a concise explanation of the subject matter defined in the independent claims involved in the appeal, referring to the specification by page and line number. Each element of the claims is identified with a corresponding reference to the specification where applicable. Note that the citation to passages in the specification for each claim element does not imply that the limitations from the specification should be read into the corresponding claim element.

Independent claim 7 discloses a method of improving customer loyalty via real time generation and provision to a customer of a customer incentive report remote from a point of sale. Application at 3, lines 10-14; Application at 7, lines 18-25; Application at 9 lines 19-23. Claim 7's method comprises utilizing a computer to execute a plurality of steps. Application at 7, lines 18-25. The plurality of steps comprise: (1) selecting a product information related to a product, Application at 7, lines 18-25; (2) storing a purchase information related to the purchase of the product by a customer, Application at 5, lines 1-7; (3) storing a customer information related to the customer, the customer information associating the customer with the purchase, Application at 5, lines 1-25; (4) storing a promotion information related to a promotion of the product, the promotion being independent of the customer information, wherein the promotion information includes both current and future promotional incentives, Application at 5, lines 16-25; (5) determining an intersection of the promotion information, the purchase information, and the customer information and storing the intersection in a database as the customer incentive report, Application at 6, lines 4-11; (6) wherein the database comprises a first table containing the product information, a second table comprising the purchase information, and a third table comprising the promotion information and a reference to a row of at least one other table in the database,

Application at 5, lines 1-15; and, following the determining step, fashioning the second table responsive to an item identifier attribute of the first table, Application at 5, lines 1-15; Application at 12, lines 16 – 13, line 9; picking at least one row from the first table or the second table Application at 5, lines 1-15; Application at 12, lines 16 – 13, line 9; receiving an identifier comprising at least a portion of the first table, Application at 5, lines 1-15; Application at 12, lines 16 – 13, line 9; and fashioning the third table with the identifier, Application at 5, lines 1-15; Application at 12, lines 16 – 13, line 9.

VI. GROUNDS FOR REJECTION TO BE REVIEWED ON APPEAL

1. Whether claim 7 particularly points out and distinctly claims the subject matter regarded as the invention under 35 U.S.C. § 112. The Examiner concluded that claim 7's recited steps "do[] not produce any results of the preamble" and that "it is unclear as to what the fashioning the third table had to do with functionality of the invention." See Final Office Action at 5.
2. Whether claims 7, 9, 10, and 16-25 are unpatentable under 35 U.S.C. § 102(b) over U.S. Patent No. 5,649,114 to Deaton et al., (hereinafter, "*Deaton*"). Specifically, whether claim 7 (the Application's independent claim from which all other claims of the Application depend), is unpatentable under § 102(b) based upon the Examiner's contention that *Deaton* contains all the elements of independent claim 7.

VII. ARGUMENT

Appellant respectfully traverses the rejections recited in the October 17, 2008 Final Office Action (hereinafter, “Final Office Action”). First, Appellant asserts that the Examiner’s Section 112 rejection is improper. Further, Appellant asserts that recited claim elements in independent claim 7 satisfy 35 U.S.C. § 112’s requirements because they particularly point out and distinctly claim the subject matter of the invention. Specifically, claim 7’s body contains elements that produce results of the preamble. Moreover, claim 7’s elements are also related to the functionality of the claimed invention.

Appellant also contends that the Examiner’s lone cited art reference, *Deaton*, does not anticipate the instant claims because *Deaton* does not teach all of the elements of independent claim 7.

A. Claim 7’s Elements Satisfy 35 U.S.C. § 112.

The Final Office Action states, “[c]laim 7 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.” See Final Office Action at 5.

In support of his Section 112 rejection, the Examiner states, “[c]laim 7 is not clear because steps in claim do not produce any results of the preamble,” and that it is “unclear as to what the fashioning the third table had to do with the functionality of the invention.” See Final Office Action at 5.

Appellant contends that the Examiner has confused and conflated the concepts of “indefiniteness,” “use,” and “method” to arrive at his section 112 rejection of claim 7.

As cited in the Final Office Action, 35 U.S.C. § 112, second paragraph provides:

[t]he specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

See Final Office Action at 5 (citing 35 U.S.C. § 112, second paragraph).

Claim 7 reads:

7. A method of improving customer loyalty via real time generation and provision to a customer of a customer incentive report remote from a point of sale, said method comprising:

utilizing a computer to execute a plurality of steps, the steps comprising:

selecting a product information related to a product;

storing a purchase information related to the purchase of the product by a customer;

storing a customer information related to the customer, the customer information associating the customer with the purchase;

storing a promotion information related to a promotion of the product, the promotion being independent of the customer information, wherein the promotion information includes both current and future promotional incentives;

determining an intersection of the promotion information, the purchase information, and the customer information and storing the intersection in a database as the customer incentive report;

wherein the database comprises a first table containing the product information, a second table comprising the purchase information, and a third table comprising the promotion information and a reference to a row of at least one other table in the database; and,

following the determining step:

fashioning the second table responsive to an item identifier attribute of the first table; and

picking at least one row from the first table or the second table; and,

receiving an identifier comprising at least a portion of the first table; and

fashioning the third table with the identifier.

See Claims Appendix, *infra*.

1. Claim 7 is Not a “Use” Claim.

Appellant believes the Examiner has based his Section 112 rejection on a misunderstanding of M.P.E.P. Section 706.03(d) and the improper conclusion that claim 7 is a “use” claim. M.P.E.P. Section 706.03(d) is titled “Rejections Under 35 U.S.C. 112, Second Paragraph.” *See* M.P.E.P. § 706.03(d).

Clearly, the Examiner is attempting to base his Section 112 rejection on the provisions of Paragraph 7.34.01 of Section 706.03(b). Paragraph 7.34.01 (“Indefiniteness”) serves as the guideline for Section 112, second paragraph indefiniteness rejections based on “failure to point out and distinctly claim” the subject matter which applicant regards as the invention. *Compare* Final Office Action at 5 (Section 112, second paragraph rejection of claim 7) to M.P.E.P. § 706.03(d), ¶ 7.34.01 (Section 112, second paragraph indefiniteness rejection guideline).

A review of Paragraph 7.34.01 reveals that a Section 112, second paragraph rejection must also include at least one of the form paragraphs 7.34.02 – 7.34.11. *See* § 706.03(d), ¶ 7.34.01. A review of the necessarily included form paragraphs reveals that Paragraph 7.34.06 “Use Claims” is the paragraph relied upon by the Examiner. *Compare* Final Office Action at 5 (“Claim 7 is not clear because steps in claim do not produce any results of the preamble.”) to M.P.E.P. § 706.03(d), ¶ 7.34.06 (“Claim [1] provides for the use of [2], but, since the claim does not set forth any steps involved in the method/process, it is unclear what method /process applicant is intending to encompass.”).

It is apparent that the Examiner is mistakenly construing instant claim 7 as a “use” claim -- hence his reliance on the form paragraph language of Paragraph 7.34.06. However, as is evident from a cursory reading of claim 7 as provided above, claim 7 is not a “use” claim (although claim 7 contains significant verbiage, claim 7 does not contain the term “use” or any of its derivatives).

An example of an improper “use” claim is found in this Board’s decision in *Ex parte Erlich* where the Board determined a claim reciting “[a] process for using monoclonal antibodies of claim 4 to isolate and purify human fibroblast interferon” was indefinite because it merely recited a use without any active, positive steps delimiting how this use was actually practiced. See *Ex parte Erlich*, 3 USPQ2d 1011 (Bd. Pat. App. & Inter. 1986). Claim 7 is in no way similar to the improper “use” claim of *Ex parte Erlich*. Claim 7 cannot be a “use” claim because: (1) it does not recite a “use;”¹ and (2) it contains steps delimiting how the method is to be performed.

2. The Examiner’s Section 112 Rejection is Unsupported.

Despite the Appellant’s belief that the Examiner has confused and conflated the concepts of “indefiniteness,” “use,” and “method;” Appellant submits the following discussion to “substantively” address the Examiner’s Section 112 rejection, without conceding the validity or propriety of said rejection.

Regarding the Examiner’s first ground for the Section 112 rejection, that “[c]laim 7 is not clear because steps in the claim do not produce any results of the preamble,” Appellant is nonplussed. See Final Office Action at 5. Appellant submits that each of the steps contained in claim 7 contribute to the claimed method of “improving customer loyalty via real time generation and provision to a customer of a customer incentive report remote from a point of sale.” Furthermore, Appellant contends that claim 7 is replete with specific steps “producing results of the preamble.”

¹ In the case of *Ex parte Porter*, 25 USPQ2d 1144 (Bd. Pat. App. & Inter. 1992), the Board held that a claim which clearly recited the step of ‘utilizing’ was not indefinite under 35 U.S.C. 112, second paragraph. (Claim was to “[a] method for unloading nonpacked, nonbridging and packed, bridging flowable particle catalyst and bead material from the opened end of a reactor tube which comprises utilizing the nozzle of claim 7.”). Claim 7 clearly recites a “utilizing” step -- “utilizing a computer to execute a plurality of steps, the steps comprising;” See Claim Appendix, *infra*. Thus, per *Ex parte Porter*, claim 7 is not indefinite under 35 U.S.C. Section 112.

For example, claim 7's preamble includes the concept of providing "a customer incentive report" and claim 7's body provides "storing the intersection in a database as the customer incentive report." See Claim Appendix, claim 7, *infra*. Undisputedly, the "customer incentive report" stored in the database (as provided in the body of claim 7) "produce[s] [the] result[]" of the preamble," in that the same "customer incentive report" stored in a database as the intersection of "the promotion information, the purchase information, and the customer information" of claim 7's body is provided to the customer as part of the method of increasing customer loyalty indicated in the preamble. See Claim Appendix, claim 7, *infra*.

Regarding the Examiner's second ground for the Section 112 rejection, it is "unclear as to what the fashioning the third table had to do with the functionality of the invention;" claim 7 is explicitly clear. Claim 7 provides, "the database comprises a first table containing the product information, a second table comprising the purchase information, and a third table comprising the promotion information and a reference to a row of at least one other table in the database." See Claim Appendix, claim 7, *infra*. Appellant submits, sans the "fashioning of the third table," the "customer incentive report" could not be provided per the preamble because the third table contains the "promotion information" that is used to "determin[e] and intersection of the promotion information, the purchase information, and the customer information [which is stored] as the customer incentive report." See Claim Appendix, claim 7, *infra*.

Based on the entirety of the above discussions, Appellant requests that the Examiner's Section 112 rejections be rescinded.

B. Claim 7 is Not Anticipated by Deaton.

Appellant respectfully asserts that *Deaton* does not teach the “*real time* generation and provision *to a customer* of a customer incentive report *remote* from a point of sale,” as recited in claim 7. *See* Claim Appendix, claim 7, *infra*. (emphasis added).

As explained by the Court of Appeals for the Federal Circuit: “[a] claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegall Bros. v. Union Oil Co. of California*, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

1. Deaton Does Not Expressly Disclose All of Claim 7’s Elements.

Deaton does not anticipate the instant claims because *Deaton* does not expressly disclose all of claim 7’s elements. The Final Office Action states, “[w]ith respect to claim 7, Deaton teaches method of improving customer loyalty via real time generation and provision of a customer incentive report [*remote*] from a point of sale (column 4, lines 54-61)” *See* Final Office Action at 6 (emphasis added to show element not considered by Examiner). For ease of reference, *Deaton*, col. 4, lines 54-61 is reproduced below:

identification, to enable a store to adopt a risk management approach to credit verification based on a customer’s transactional history (frequency and dollar volume over specified intervals), and to improve a store’s marketing and other customer relations programs by collecting transactional data for that store, both current and historical, that can be used to identify new or infrequent customers, develop customer

See Deaton at col. 4, lines 54-61. As can easily be seen, this portion of text cited by the Examiner has nothing to do with the “*real time* generation and provision *to a customer* of a customer incentive report *remote* from a point of sale,” as recited in claim 7. *See* Claim Appendix, claim 7,

infra (emphasis added). Furthermore, *Deaton*'s teachings regarding its provision of coupons² are limited in two ways that prevent *Deaton* from anticipating claim 7.

First, *Deaton* teaches that its coupons are provided at the point-of-sale, not at a location remote from the point-of-sale. See *Deaton* at ABSTRACT; see also Figures 17-45B (all figures are directed to the point of sale); col. 70, lines 30-31; col. 73, lines 55-60 ("FIGS. 19-45A-B illustrate various apparatus and program flow diagrams of a system which not only performs automatic payment processing of a customer's payment at the POS but also generates automatic targeted marketing to the customer at the POS . . ."). Thus, in its preferred embodiment, *Deaton* cannot anticipate claim 7's element concerning the provision of "a customer incentive report remote from a point of sale." See Claim Appendix, claim 7, *infra* (emphasis added).

Second, while *Deaton* includes a limited discussion regarding generating coupons to be mailed to customers that arguably could be read as the "provision to a customer of a customer incentive report remote from a point of sale," this liberal reading is not enough to anticipate claim 7. See *Deaton* at col. 58, line 42 – col. 70, line 28. *Deaton*'s disclosure regarding the mailing of coupons does not anticipate claim 7 because *Deaton*'s disclosure regarding the mailing coupons, on its face, precludes the "*real time* generation and provision *to a customer* of a customer incentive report." See Claim Appendix, claim 7, *infra* (emphasis added). Because *Deaton* teaches that its coupons are to be mailed, the coupons cannot be provided to the customer in real time upon

² To support his rejections, the Examiner equates the instant application's "customer incentive report" to *Deaton*'s provision of coupons. See Final Office Action at 4 ("Deaton teaches Customer incentive report as, the system generates coupons or issue[s] incentives to induce that higher level of performance by the customer.").

generation. See, e.g., *Deaton* at col. 63, lines 38-39 (“the store can then mail out direct mail enticements to the customer” and col. 65, lines 22-24 (“coupons or other enticements can be mailed directly to customers”).

Appellant respectfully submits that, as explained above, *Deaton* does not anticipate the instant claims because *Deaton* does not expressly disclose all of claim 7’s elements. See *Verdegall Bros. v. Union Oil Co. of California*, 2 USPQ2d at 1053. Because claim 7 is not anticipated by *Deaton*, it is presented in allowable condition. Additionally, because claims 9, 10 and 16-25 are dependent on amended claim 7, claims 9, 10 and 16-25 are also presented in allowable condition. As such, Appellant respectfully requests that the Final Office Action’s rejections be rescinded and the instant application be moved to issuance.

2. Claim 7’s Elements are Not Inherent to *Deaton*.

Deaton does not anticipate the instant claims because *Deaton* does not inherently disclose all of claim 7’s elements. The Examiner explicitly concedes that his lone 102(b) reference, *Deaton*, does not expressly teach all of claim 7’s elements. See Final Office Action at 7 (wherein the Examiner inexplicably relies on *Schering Corp. v. Geneva Pharm. Inc.*, 64 USPQ2d. 1032 (D.N.J. 2002) to support his contention that all of instant claim 7’s elements are somehow inherent to *Deaton*’s disclosed processes).

The Examiner appears to want to base an inherency finding on the singular concept that the claim 7 elements that are missing from *Deaton*’s express disclosure would, nevertheless, be recognized by a person of ordinary skill as being present in *Deaton*. See Final Office Action at 3. The Examiner does not seem to appreciate that the court in *Schering Corp.* identified a two-pronged test for inherency. See *Schering Corp. v. Geneva Pharm. Inc.*, 64 USPQ2d. at 1038 (“To serve as an anticipation when the reference is silent about the asserted inherent characteristic . . .

evidence must make clear that the missing descriptive matter is *necessarily present* in the thing described in the reference, and that it would be so recognized by persons of ordinary skill.’ (citations omitted)’ (emphasis added). Thus, the *Schering Corp.* test for inherency requires: (1) the missing descriptive matter to be necessarily present in the reference; and (2) that a person of ordinary skill would recognize the descriptive matter that is missing from the reference. *See id.*

The Examiner’s inherency conclusion rests solely on *Schering Corp.*’s second prong. The Examiner suggests that *Deaton*’s disclosure of “prior credit verification systems that require[] connecting a point-of-sale terminal through telephone lines to a remote transaction processing system,” inherently discloses claim 7’s provision of a customer incentive report remote from a point of sale. *See* Final Office Action at 4 (emphasis in original).

Appellant believes the Examiner’s position to be that, because *Deaton* discloses that in some prior credit verification systems, point of sale devices were connected to transaction processing systems via telephone lines, *Deaton* “inherently” discloses claim 7’s provision of “a customer incentive report remote from a point of sale” element. The only support for his position is the statement, “[t]hus, at the point-of-sale and remote location, coupons or other incentives (**reports**) may be generated (in **real time**) which are specifically targeted to a specific customer based on his or her prior history.” *See* Final Office Action at 4 (emphasis in original).

The Examiner’s position is fundamentally flawed. Appellant directs the Board’s attention to the Examiner’s own description of *Deaton*’s disclosure, “coupons or other incentives (**reports**) *may* be generated” *See id.* (emphasis added). As specifically noted by the Examiner, the generation of coupons at a location remote from a point of sale, is not an element that is *necessarily present* in *Deaton*. *See Schering Corp. v. Geneva Pharm. Inc.*, 64 USPQ2d. at 1038.

Thus, by the Examiner's own admission, *Deaton* cannot satisfy both prongs of the *Schering Corp.* inherency test.

Furthermore, as the court in *Schering Corp.* recognized, “[i]nherency . . . may not be established by probabilities or possibilities . . . ***that a certain thing may result from a given set of circumstances is not sufficient***” See *Schering Corp. v. Geneva Pharm. Inc.*, 64 USPQ2d. at 1038 (citations omitted) (emphasis added). Thus, just because the Examiner believes that *Deaton*'s disclosure could be understood by a person of ordinary skill in the art to possibly allow for the provision of “a customer incentive report remote from a point of sale,” as the court in *Schering Corp.* explained, “probabilities or possibilities” are “not sufficient” to establish inherency. See *id.*

Based on the foregoing discussion, Appellant respectfully submits that, as explained above, *Deaton* does not anticipate the instant claims because *Deaton* does not inherently disclose all of claim 7's elements. See *Verdegall Bros. v. Union Oil Co. of California*, 2 USPQ2d at 1053. Because claim 7 is not anticipated by *Deaton*, it is presented in allowable condition. Additionally, because claims 9, 10 and 16-25 are dependent on amended claim 7, claims 9, 10 and 16-25 are also presented in allowable condition. As such, Appellant respectfully requests that the Final Office Action's rejections be rescinded and the instant application be moved to issuance.

VIII. CONCLUSION

In view of the above arguments the Appellant respectfully requests that the final rejection of the claims be rescinded and the case advanced to issue. Should the Examiner feel that a telephone interview would advance prosecution of the instant application, Appellant invites the Examiner to call the attorneys of record.

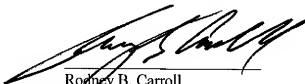
The Commissioner is hereby authorized to charge payment of any further fees associated with any of the foregoing papers submitted herewith, or to credit any overpayment thereof, to Deposit Account No. 50-1515, of Conley Rose, P.C. of Texas.

Respectfully submitted,
CONLEY ROSE, P.C.

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IX. CLAIMS APPENDIX***Listing of Claims:***

1-6. (Canceled)

7. A method of improving customer loyalty via real time generation and provision to a customer of a customer incentive report remote from a point of sale, said method comprising:

utilizing a computer to execute a plurality of steps, the steps comprising:

selecting a product information related to a product;

storing a purchase information related to the purchase of the product by a customer;

storing a customer information related to the customer, the customer information associating the customer with the purchase;

storing a promotion information related to a promotion of the product, the promotion being independent of the customer information, wherein the promotion information includes both current and future promotional incentives;

determining an intersection of the promotion information, the purchase information, and the customer information and storing the intersection in a database as the customer incentive report;

wherein the database comprises a first table containing the product information, a second table comprising the purchase information, and a third table comprising the promotion information and a reference to a row of at least one other table in the database; and,

following the determining step:

fashioning the second table responsive to an item identifier attribute of the first table; and

picking at least one row from the first table or the second table; and,

receiving an identifier comprising at least a portion of the first table; and

fashioning the third table with the identifier.

8. (Canceled)

9. The method of claim 7 wherein the delivery step comprises delivery of a computer-readable copy of the customer incentive report to the customer.

10. The method of claim 7 wherein the delivery step comprises delivery of a printed copy of the customer incentive report to the customer.

11-15. (Canceled)

16. The method of claim 9 wherein the computer-readable copy of the customer incentive report includes current incentive offers, future incentive offers, or a combination thereof.

17. The method of claim 16 wherein the offers disclose pricing information.

18. The method of claim 16 wherein the offers disclose wellbeing information.

19. The method of claim 18 wherein the wellbeing information comprises nutritional information, caloric information, cholesterol information, or combinations thereof.

20. The method of claim 10 wherein the printed copy of the customer incentive report includes current incentive offers, future incentive offers, or a combination thereof.

21. The method of claim 20 wherein the offers disclose pricing information.

22. The method of claim 20 wherein the offers disclose wellbeing information.

23. The method of claim 22 wherein the wellbeing information comprises nutritional information, caloric information, cholesterol information, or combinations thereof.

24. The method of claim 9 wherein the computer-readable copy of the customer incentive report includes customer loyalty program information.

25. The method of claim 10 wherein the printed copy of the customer incentive report includes customer loyalty program information.

26-32. (Withdrawn)

X. EVIDENCE APPENDIX

None.

XI. RELATED PROCEEDINGS APPENDIX

None.